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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ASHWORTH TRANSFER, INC.,

Plaintiff,

—VS.—

Clerk, Supreme Court, Utah

THE PUBLIC SERVICE COMMIS-
SION OF UTAH; HAL S. BEN-
NETT, DONALD HACKING and
JESSE R. S. BUDGE, its Commis-
sioners; and CARBON MOTORWAY,
INC.,

Defendants.

Case No.
9320

PETITION FOR REHEARING
AND
BRIEF OF PLAINTIFF IN SUPPORT THEREOF

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INDEX

	<i>Page</i>
PETITION FOR REHEARING.....	1
POINT I	
THE COMMISSION ERRED IN ITS INTERPRETA- TION OF SECTION 41-6-5 (f) U.C.A. 1953 WHICH DEFINES EXPLOSIVES.	2
BRIEF IN SUPPORT OF PETITION FOR REHEARING....	2

STATUTES CITED

U.C.A. 1953, Section 41-6-5.....	2-3-4
----------------------------------	-------

CASES CITED

W. S. Hatch v. Public Service Commission, 3 Ut. (2d) 7 277 Pac. (2d) 809, 811	3
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Defendants.

Case No.
9320

PETITION FOR REHEARING

COMES NOW the plaintiff, ASHWORTH TRANSFER, INC., and petitions the Honorable Court for a rehearing of the above entitled matter on the ground and for the reason that the Court and the opinion filed therein January 25, 1961 fails to consider and decide the primary issue of the case, and the first Point in plaintiff's appeal and brief, namely:

THE COMMISSION ERRED IN ITS INTER-
PRETATION OF SECTION 41-6-5 (f) U.C.A.
1953 WHICH DEFINES EXPLOSIVES.

BRIEF IN SUPPORT OF PETITION FOR
REHEARING

The very first and primary point in plaintiff's brief related to the Utah statute which defines *explosives*, namely Section 41-6-5 (f) U.C.A. 1953 which reads:

“Explosives.” Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion, by percussion or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.”

Plaintiff has long recognized that a finding of fact by the Public Service Commission, supported by competent, creditable evidence, will be respected by this Court. However, such is not the issue in this case as the error occurred in the improper statutory construction by the two Commission members.

Your Honorable Court has always reserved the prerogative of interpreting the statutes and is not shackled by a purported finding of “fact” which in truth and fact is merely a conclusion of law. When the Commission errs in its conclusions, as two of its members have in this case, then this Court can and must rectify that error.

In *W. S. Hatch v. Public Service Commission*, 3 Utah (2d) 7, 277 Pac. (2d) 809, 811 your Court stated that the interpretation of a certificate “presents a question of law only.” So too in this case it is a question of interpretation of the statute and the Ashworth certificate.

The majority opinion by the Commission in its Finding No. 4 (R.) quotes Section 41-6-5 (f). Then in the next paragraph admits that “ammonium nitrate is undoubtedly a ‘chemical compound,’ also within the statutory definition, ammonium nitrate is ‘commonly used and intended for the purpose of producing an explosion,’ and is also an ‘oxidizing material’.” Notwithstanding these concessions as to the statutory basis for defining ammonium nitrate as an explosive, these two Commissioners then erred in concluding that it is not an explosive. Such is not a factual determination but an erroneous legal conclusion.

The certificate held by Ashworth Transfer, Inc., which authorizes transportation of “explosives” was

granted subsequent to the enactment of the statutory definition and hence due recourse to that statutory definition should have been had by the Commission and by this Court.

We respectfully submit that this Court has fallen into the same error as the Commission by failing to make the determination, which is inescapable, that the substance ammonium nitrate as transported by Ashworth Transfer, Inc. to Bingham Canyon for blasting is an “explosive” within the definition of the Utah Statute, Section 41-6-5 (f) U.C.A., 1953.

The testimony of Mr. Hardy as to the chemical compound and general properties of ammonium nitrate is to be properly considered, but his bald conclusion that this powerful blasting agent is not an explosive is not competent evidence to support the “finding” of the Commission when it flies in the face of the statute. Mr. Hardy is not an independent “expert” witness in the ordinary sense, as he is an employee of a railroad association and the only protestant, Carbon Motorway, is under control of Denver & Rio Grande Western Railroad, a member of said association.

Let us turn to the language of the statute, Section 41-6-5 (f) U.C.A. 1953, and see whether or not, on the face of it, this commodity does qualify as an “explosive” in

Utah. Our Public Service Commission has not adopted any formal definitions in contravention of this statutory expression.

First, we recognize that ammonium nitrate is a "chemical compound" as referred to in the statute, as Mr. Hardy specified that such is a combination of ammonium, nitrate, oxygen and other chemicals. We know that such is the product of the chemical plant adjoining the steel mill at Geneva, Utah, and thus the first qualification of the statute is met. In addition, each grain is coated with Fuller's earth. *Second*, it is "commonly used or intended for the purpose of producing an explosion." The fact that Ashworth has transported 40,000 pound loads four times a week for the past year, and Carbon Motorways transported 7,605,406 pounds of it to the Kennecott Copper mine for blasting purposes would seem to substantiate the fact that it is "commonly used or intended for the purpose of producing an explosion." The witnesses affirmed the common usage of it in mining and construction operations and for blasting purposes. *Third*, "shall contain any oxidizing and combusive units or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion, by percussion or by detonator *of any part of the compound or mixture* may cause such a sudden generation of highly heated gases that the resultant gaseous pres-

tures are capable of producing destructible effects on (contiguous) objects or of destroying life or limb.” (emphasis ours.) The oxidizing factor here involved, as specified by the statute, is admitted by all parties and it is so classified by the regulations of the Interstate Commerce Commission. There is no question but what at the Kennecott Copper mine the same is ignited by a detonator or by fire, within the language of the statute, and thereupon it blasts away.

The statutory definition is a guide to the Public Service Commission and to this Court and must not be ignored by either. Ashworth’s certificate uses the word “explosives,” a word of art, as the statutory definition was extant when the certificate was issued. The opinion of the self styled “expert,” not based upon statutory considerations, cannot control or alter the statutory basis.

Technological advances in the past have produced new types of explosives and will do so in the future. The statutory language is broad and inclusive so as to encompass any substance actually used in blasting. Hyper-technical, hair-splitting definitions of an explosive by Mr. Hardy do not negative the hard, real facts that ammonium nitrate is daily used in vast quantities at the Utah Copper mine in Bingham Canyon for blasting. The statute includes it and the Court should not close its eyes thereto.

WHEREFORE, plaintiff respectfully prays that this Court rehear this case or reconsider its opinion herein and make the legal determination that the ammonium nitrate used for blasting and transported by Ashworth Transfer, Inc., to Bingham Canyon is an “explosive” within the language of the said Utah statute and the Ashworth certificate.

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